

"PALESTINIAN SELF-DETERMINATION":
POSSIBLE FUTURES FOR THE UNALLOCATED TERRITORIES
OF THE PALESTINE MANDATE

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Slowly and reluctantly, Europe and the United States are coming to realize that the pattern of events in the Middle East reflects more than random turbulence in the aftermath of the British and French Empires. For nearly thirty turbulent years, the Soviet Union has sought control of this geo-political nerve center in order to bring Western Europe into its sphere. Even if Soviet ambitions were confined to Europe, Soviet hegemony in the Middle East would profoundly change the world balance of power. But Soviet control of the Middle East would lead inevitably to further accretions of Soviet power if China, Japan, and many smaller and more vulnerable countries should conclude that the United States had lost the will or the capacity to defend its vital interests, and that *sauve qui peut*, and devil take the hindmost, had therefore become the order of the day.¹

The exploitation of Arab hostility to the Balfour Declaration, the Palestine Mandate, and the existence of Israel has been a major weapon in the Soviet campaign to

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1. In all countries, and especially in the NATO countries, Japan and China, there are significant advocates of accommodation with the Soviet Union. Many believe in that policy at nearly any price. The influence of such opinions has increased automatically as the West has allowed what the Soviets call "the correlation of forces" to become unfavorable.

dominate the Middle East.² The Soviet Union's use of this tactic is in itself a considerable psychological feat, since the Russians provided Israel with decisive help during the wars of Israeli independence in 1948 and 1949. The anti-Israel card is not the only asset in the Soviet Union's Middle East hand, but among the Middle Eastern masses it has been trumps.

The goal of the Soviet campaign in the Middle East is to control the oil, the seas, and the air space of the region, and to substitute Communist or Communist-oriented governments for royal and other traditional regimes. Once such control is achieved, the Soviet Union believes, it will be possible for it to outflank Europe and force the United States to dismantle NATO, withdraw its forces, and leave Europe to Soviet domination, in the model of Finland, Poland, or Vichy, as may prove to be convenient.³

In pursuit of this objective, the Soviet Union has been active from Morocco to Pakistan, and throughout Africa as well, taking advantage of other regional conflicts, many of which it fomented itself.⁴ But the

2. The first moves came in the early 1950's, as the Soviet Union's original support for the creation of Israel was reversed. See N. Safran, *The Soviet Union and Israel: 1947-1969*, in *The Soviet Union and the Middle East: The Post-World War II Era* (I. Lederer & W. Vucinich eds. 1974); U. Ra'anan, *The USSR Arms the Third World* (1969). For a discussion of later developments, see also C. McLane, *Soviet-Middle East Relations* (1973); E. Rostow, *The Soviet Threat to Europe Through the Middle East*, in *Defending America* (Conquest et al., eds 1977); *United States Foreign Policy in the 1980's*, in *Iran in the 1980's* (A. Amirie & H. Twichell eds. 1978); Spector, *The Soviet Union and the Palestine Conflict*, in *The Transformation of Palestine* 413 (I. Abu-Lughod ed. 1971).

3. This strategy has been examined in greater detail elsewhere. See, e.g., E. Rostow, *Peace in the Balance* 250-82 (1972); A. Ulam, *Expansion and Coexistence* 613-18, 731-38, 757-66 (2nd ed. 1974). Professor Ulam comments that what a sober Soviet diplomat might well regard as "the excessive American incapacity in international affairs" gave the Soviet Union a "dazzling succession of opportunities" which constituted an "irresistable temptation" to take excessive risks. *Id.* at 613-614.

4. See A. Klieman, *Soviet Russia and the Middle East* (1970). The more recent steps in the Soviet campaign to control the Middle East, including its actions in Angola, the Horn of Africa, Iran, and Afghanistan and its presence in Libya, have aroused a considerable response in the West.

attack on the legitimacy of Israel has been the strongest and most effective tool of Soviet strategy in the Middle East. Since the early 1950's, the Soviet Union has actively supported four major Arab wars against Israel,⁵ as well as guerrilla raids, terrorist attacks, and the like beyond counting. The Palestine Liberation Organization (P.L.O.) was planned and established in the 1960's. In recent years, and especially since November, 1973, when Yasir Arafat was first invited to the Soviet Union as guest of the Soviet government, the Soviet Union has played an active--some say a dominant--role in its activities.⁶ The Soviet Union now has a large naval presence both in the Mediterranean and in the Indian Ocean, and bases in Aden and a number of points in Africa, including Libya.

The Soviet calculation has been that Arab dependence upon the Soviet Union would grow as the war against Israel involved and radicalized more and more of the Muslim states of the region. President Sadat's decision to make peace with Israel, following Egypt's defeat in the 1973 war, was a serious setback for the Soviet Union. The U.S.S.R. has moved with great energy to offset and reverse that disappointment, undertaking bold moves in Ethiopia, Somalia, Angola, Sudan, Yemen, Iran, Afghanistan, and the Persian Gulf to strengthen its position. And it has pressed the so-called Palestinian issue with increased emphasis to prevent peace between Israel and its neighbors.⁷

From the beginning, the Soviet Union actively supported the movement to overthrow the Shah of Iran in 1978 and 1979, both through its own efforts and through those of the P.L.O. and the Italian Communist Party. The P.L.O. participated in the Iranian revolution and was publicly thanked for its contribution by the Ayatol-

5, *I.e.*, the Suez War of 1956 (caused by the Soviet supply of arms to Egypt); the Six Day War of 1967; the War of Attrition of 1969-1970; and the Yom Kippur War of 1973.

6, *See* G. Golan, *The Soviet Union and the PLO*, (1976); A. Norton, *Moscow and the Palestinians: A New Tool of Soviet Policy in the Middle East* (1974).

7, After the 1973 War, when there was some danger that Egypt and other countries might make peace with Israel, the Soviet Union invited Arafat to Moscow, supported his appearance before the United Nations in November, 1974, and increased its pressure for General Assembly resolutions supporting claims of self-determination for the Palestinian Arabs and denouncing Zionism as "racism."

lah Khomeini during his struggle for power.⁸ The role of the Italian Communist Party was clandestine, although it has been widely reported. It is generally used as a vehicle for such Soviet enterprises in the Mediterranean and the Middle East.

The revolt against the Shah appealed to the Soviet leadership in light of its own interests, since Iran is close to the center of one of its main strategic objectives in the region--its oil reserves. But the Soviet move against Iran was also closely linked to the Soviet campaign against Israel.⁹ Under the Shah, Iran was the principal bastion of American influence in the area, Israel's close ally, a positive influence in Jordan, and an ultimate counterweight, should such action become necessary, against Iraq and Syria. Iran's relation with Israel was one of the reasons the P.L.O. participated so vigorously in the revolt against the Shah.

After the Camp David Agreements between Israel and Egypt were signed in 1978,¹⁰ the Soviet propaganda drums beat with new intensity to encourage their repudiation, or at least their frustration. Policy followed suit. While President Sadat has not yet been overthrown, the Soviet Union has successfully used other means to further its ends.¹¹ Among these means, the so-called "Palestine" question is the most effective. Beneath the surface of the propaganda and guerrilla activities, there is a genuine political and human problem--a difficult but not insoluble problem of principle and of accommodation. But the real Palestinian problem bears no relation to the distorted version which has been imposed on the governments, press, and public opinion of the West.

This paper will be concerned with the background of the current controversy over "Palestinian" rights, in the context of the American effort to carry out the Camp David Agreements and the Soviet Union's campaign to achieve dominance in Europe by enveloping it from the South.

8. See 23 Near East Report 5,7 (1979).

9. See Soviet World Outlook, Nos. 2, 3 & 12 (1979).

10. 78 Dep't State Bull. 7 (1978); 17 Int. Legal Mat. 1463 (1978).

11. The Soviet strategy has concentrated on isolating Egypt from other Arab countries, supporting the war against Lebanon, and pushing "self-determination" for the Palestinian Arabs living in the West Bank and the Gaza Strip. See, e.g., 4 Soviet World Outlook, Nos. 1 & 2 (1979).

I

Throughout Europe and the United States, in the General Assembly and the Security Council of the United Nations, and in many other resonant forums, there is an increasingly shrill chorus of demands that Israel be more "flexible" and that the United States "force" Israel to acquiesce in the establishment of a third Palestinian state--an Arab state in the territories of Palestine generally known as the West Bank (including Jerusalem) and the Gaza Strip.¹² It is expected that such a state would be under the control of the P.L.O. This view is now supported--nominally, at least-- by most governments in Western Europe.

On March 1, 1980, the United States came perilously close to accepting the European position by voting in the Security Council in favor of a Resolution calling on Israel to dismantle all the West Bank settlements it had established since June, 1967. President Carter, it would seem, was ready to vote for this measure, but not for the corresponding provisions about Jerusalem.¹³ In the early months of 1980, it was widely rumored that France had persuaded Great Britain and West Germany to back an effort in the Security Council to modify Resolution 242, adopted after the Six Day War in 1967, and the only feasible basis for efforts to make peace between Israel and its neighbors.¹⁴ The amendment the French are urging would favor "self-determination for the Palestinian people"--a formula intended to pave the way

12. See, e.g., Ball, *The Coming Crisis in Israeli-American Relations*, 58 Foreign Affairs 231, 245-256 (1979); Hoffman, New York Review of Books, Aug. 17, 1978, at 42; New York Times, Feb. 13, 1980, at A26 (editorial); and *The Price of West Bank Settlements* Washington Post, Feb. 12, 1980, at A18 (editorial).

13. See *President Criticizes Israeli Settlements*, New York Times, March 8, 1980, at 15. Text of the resolution reprinted in New York Times, March 5, 1980, at A12, col. 1.

14. On Resolution 242, see A. Lall, *The UN and the Middle East Crisis, 1967* (1968); G. Rafael, *UN Resolution 242: A Common Denominator*, The New Middle East (June, 1973); E. Rostow, *The Illegality of the Arab Attack on Israel of October 6, 1976*, 69 Am. J. Int'l L. 272, 276-286 (1975); A. Goldberg, *United Nations Security Council Resolution 242 and the Prospects for Peace in the Middle East*, 12 Colum. J. Trans. L. 187 (1975).

for a third Palestinian state.¹⁵

As the Middle Eastern troubles of Western policy have become more ominous, with Iran in anarchy and the Soviet Union in control of Afghanistan, the West has been drawn more and more feverishly to the idea of doing something "positive" for the Arabs by getting Israel to accept a second Arab Palestinian state on the West Bank and the Gaza Strip. Such a concession on the part of Israel is necessary, the advocates of this course contend, in order to make it possible for the Arab states of the region to join the United States in resisting the further expansion of Soviet power. Unless the Palestine problem is solved in this way, they warn, revolutionary movements backed by the Soviet Union will sweep away the governments of Saudi Arabia, Oman, and other countries.

The United States has not yet established bases in the Sinai or in Saudi Arabia, so far as is known publicly, nor is the alternative course of persuading Jordan to make peace much discussed.

The campaign for a state which is more and more explicitly a P.L.O. state including the West Bank and the Gaza Strip is irrational from the point of view of Western security interests. The emergence of such a state would weaken Israel, the strongest military power in the Middle East, and the most reliable ally of the West in the area, by necessity and conviction.¹⁶ But the irrationality of the idea has not yet affected the momentum of European, American, and Egyptian policy.

The legal assumption behind this frantic impulse is that the territories in dispute are in some sense "Arab" territories held by Israel only as military occupant. Once that premise is accepted, it seems to follow that the natural path to peace would be for Israel to evacuate the area, and to allow the population to decide whether to establish a new state or to federate with Jordan.

15. See Near East Report, Nos. 7 & 9, Feb. 13 and 27, 1980; Le Figaro (Paris), March 13, 1980, at 1.

16. See P. Cosgrove, *The Origins, Evolution and Future of Israeli Foreign Policy* (1979) (originally delivered as the sixth Sacks Lecture at the Oxford Centre for Post-Graduate Hebrew Studies May 23, 1979).

But the premise from which the familiar prescription derives is erroneous as a matter of history and international law. The only possible geographic, demographic, and political definition of Palestine is that of the Mandate, which included what are now Israel and Jordan as well as the West Bank and the Gaza Strip. The term "Palestinian" applies to all the peoples who live or have a right to live in the territory--Jews, Christians, and Muslims alike. Thus the West Bank and the Gaza Strip are not "Arab" territories in the legal sense, but territories of the Mandate which have never been recognized as belonging to Israel or to Jordan.¹⁷ Transjordan and Israel were established as states in 1946 and 1948, and were gradually recognized thereafter. Israel was admitted to the United Nations in 1949, Jordan in 1955. Israel never tried to annex the West Bank and the Gaza Strip. Jordan's attempt to annex the West Bank in 1951 was not recognized by the international community.¹⁸ Moreover, for reasons which remain compelling, Security Council Resolution 242 prescribes that Israel is under no obligation to withdraw from the West Bank or the Gaza Strip until Jordan makes peace.

Despite its great political appeal, the idea of "self-determination" for all "peoples" is a puzzling and complex factor in the political life of an international system based on the existence and sanctity of states. Most states include more than one people: Spain has Basques and Catalans; France, Bretons; Belgium, Walloons and Flemish; Canada a considerable French-speaking population. The Soviet Union is of course a combination of many peoples, widely different in language, religion, and culture. Almost all the African states include a number of tribes.

The United Nations Charter lists self-determination as one of the aspirations of the organization, to be sought by political means, but not by the international use of force. The Charter has been generally

17. For a full treatment of this question, see A. Gerson, *Israel, The West Bank and International Law* 42-47, 76-78 (1978); P. Riebenfeld, *Israel, Jordan and Palestine* (1974) (unpublished manuscript on deposit at the Yale Law Library).

18. Gerson, *supra* note 17, at 77-78.

interpreted to forbid international help for movements of secession based on the slogan of self-determination.¹⁹ The United States fought the bloodiest war of the nineteenth century to resist the plausible idea of self-determination for the South.

It is clear that the principle of self-determination can hardly be regarded as an absolute, either in international law or in international politics. It should be taken into account, with other factors, in the resolution of any conflict. But there can be no justification for claiming that it is the only principle to be applied in resolving the future of the West Bank and the Gaza Strip. For nearly sixty years, the international community has prescribed the norms which should govern the process of reaching those decisions. Its formal and fully considered prescriptions should be determinative.

II

The controversy over the future of the West Bank and the Gaza Strip can be understood only as part of the history of the Palestine Mandate, and the international law of Mandates which lies behind and informs the Security Council Resolutions purporting to govern the process of establishing peace between Israel and its neighbors.

After the First World War, the Allied powers did not annex the territory of their defeated enemies on a large scale, in the pattern of practice throughout history. Instead, in the name of the self-determination of peoples, they restored Poland, and established several new states in Europe, largely at the expense of the Austro-Hungarian Empire and the Soviet Union. Outside Europe, the Allies took over the administration of a number of territories which had been parts of the Turkish and German empires as Mandates of the League of Nations. The Mandate system of the League was the ancestor of the Trusteeship provisions of the United Na-

19. See E. Rostow, Book Review, 82 Yale L.J. 829, 850-55 (1973); L. Buchheit, *Secession: The Legitimacy of Self-Determination* 38-42 (1978).

tions Charter.²⁰ It was viewed with high hope as an instrument of justice. The founders of the League established the Mandate system in order to liberate peoples who had lived in the colonies and protectorates of empire, and to launch their new states on a footing of dignity and equality. Mandates, they explained, were "trusts," indeed "sacred trusts." It was said that the Mandatory power did not become sovereign in the territory of the Mandate. Some claimed that "title" or "sovereignty" was vested in the victorious Allies, others that "sovereignty" was suspended, or held by the League, or remained in the people who lived or had a right to live in the mandated territories.

Most of the Mandates were trusts for the benefit of their inhabitants. In the case of Palestine, the trust of the Mandate had two sets of beneficiaries. The decision to establish the Mandate, the document said, recognized "the historical connection of the Jewish people with Palestine and ... the grounds for re-constituting their national home in that country."²¹ Unlike other Mandates, the Palestine Mandate was established under the authority of paragraph 8 of Article 22 of the Covenant, which authorized the League Council explicitly to define the terms of a Mandate when the broad general statement of paragraph 1 was insufficient. The purpose of the Palestine Mandate was "the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country."²² The Mandatory government was

20. See generally, D. Hall, *Mandates, Dependencies and Trusteeships* (1948); J. Zasloff, *Great Britain and Palestine* (1952); L. Gross, *United Nations Trusteeship and League of Nations Mandate Systems*, 4 *India Quarterly* 224 (1948).

21. The quotation is from the introductory clause of the League of Nations Mandate for Palestine, *Report to the General Assembly of the United Nations Special Committee on Palestine*, Vol. II, *Annexes, Appendix and Maps* 18-22, U.N. Doc. A/364 Add. 1 (Sept. 9, 1947); reprinted in 3 J. Moore, *The Arab-Israeli Conflict* 75 (1974).

22. *Id.*

required to facilitate Jewish immigration and "close settlement" in Palestine, subject to the proviso that the Mandatory government could "postpone or withhold" the application of these (and related) articles of the Mandate in the area of Palestine east of the Jordan River.²³ This was done when Britain established Transjordan as an autonomous province of the Mandate in 1922.²⁴ But Jewish rights of immigration and close settlement in the West Bank and the Gaza Strip, established by the Mandate, have never been qualified.

While the Permanent Court of International Justice, its successor the International Court of Justice, and many other authorities have confirmed the status of mandates in general and of the Palestine Mandate in particular,²⁵ the dispute over the future of German Southwest Africa, long a South African Mandate, and now generally called Namibia, has been the most prolific and important source of international law on the subject.²⁶

In its series of decisions and advisory opinions on Namibia, the International Court of Justice has

23. Article 25 of the Mandate for Palestine, *reprinted in* 3 J. Moore, *supra* note 21, at 82.

24. *See* Gerson, *supra* note 17, at 44-45. The British establishment of Transjordan precluded Jewish rights of "close settlement" on the East Bank, but did not affect the West Bank or the Gaza Strip. *See* M. Gilbert, *Exile and Return* 132-134 (1978); B. Halpern, *The Idea of the Jewish State* 308-312 (2d ed., 1969); H. Sachar, *A History of Israel* 126-129 (1976).

25. The cases are numerous, beginning with the *Mavrommatis Palestine Concessions*, P.C.I.J. Series A, No. 2 (1924) and continuing through the recent Namibia opinions. *See generally* notes 20, *supra*, and 26-30, *infra*.

26. The I.C.J. has issued five opinions: *Advisory Opinion on International Status of South West Africa*, [1950] I.C.J. 128; *Advisory Opinion on South West Africa--Voting Procedure*, [1955] I.C.J. 67; *Advisory Opinion on the Admissibility of Hearings of Petitioners by the Committee on South West Africa*, [1956] I.C.J. 23; *South West Africa Cases Preliminary Objections*, [1962] I.C.J. 319; *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), [1971] I.C.J. 16. A thorough discussion of the legal status of the South West Africa Mandate is found in S. Slonim, *South West Africa and the United Nations: An International Mandate in Dispute* (1973).

ruled that a League Mandate is a binding international instrument like a Treaty, which continues as a fiduciary obligation of the international community until its terms are fulfilled.²⁷ All states, the Court, and the Security Council have responsibility for seeing to it that the terms of the Mandate are respected and carried out. And the Council (acting in the Namibian case on the recommendation of the General Assembly) has authority under Article 25 of the Charter to make binding "decisions" with regard to the future of Mandates. That authority arises from the nature of the United Nations as an institution, and the respective functions of the General Assembly and the Security Council, particularly its peace-keeping responsibilities.²⁸

In the case of Namibia, the Court upheld the Security Council's ruling that South Africa had abandoned its rights as Mandatory by breaching some of its fundamental duties.²⁹ The Mandate survived the end of the Mandate administration as a trust, however, on legal principles confirmed by Article 80 of the Charter, and remains the guiding influence for peaceful and

27. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 27-3; Advisory Opinion on the International Status of South West Africa, [1950] I.C.J. 128.

28. [1971] I.C.J. 16, 52-53. See Higgins, *The Advisory Opinion on Namibia: Which U.N. Resolutions Are Binding Under Article 25 of the Charter?*, 21 Int. & Comp. L.Q. 270, 275-284 (1972). These rulings would seem to settle long-standing concern that Article 85, which states that "[t]he functions of the United Nations with regard to trusteeship agreements...shall be exercised by the General Assembly," might be construed to establish an eccentric special authority for the General Assembly rather than the Security Council with regard to Mandates. It seems entirely appropriate that the Security Council's unquestionable authority with regard to threats to the peace, breaches of the peace, and aggressions should be held to dominate the puzzling and anomalous suggestion of Article 85.

29. See S.C. Res. 276, 25 U.N. SCOR, Resolutions and Decisions 1, U.N. Doc. S/INF/25 (1971) (affirming G.A. Res. 2145, 21 U.N. GAOR, Supp. (No. 16) 2, U.N. Doc. A/6316 (1966)).

political efforts to resolve the problem.³⁰ Diplomatic efforts to carry out this policy are now proceeding actively, with some expectation of success.

The parallel between the problems of the Palestine and the South West Africa Mandates is extraordinary, despite the fact that the manner of terminating the two Mandates was at least formally different. In the case of Namibia the International Court of Justice ruled that South Africa has ceased to be the legitimate mandatory, although *de facto* its administration continues. Both the Security Council, in its Resolution 276, and the I.C.J. agree that the future of the whole of the mandated territory is to be settled in accordance with the principles of the Mandate. In the Palestine case, Great Britain withdrew as Mandatory and the British administration of the territory ended. Like the South West African Mandate, the Palestine Mandate survived the termination of the Mandate administration as a

30. Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 33-36 and 39-40; Advisory Opinion on the International Status of South West Africa, [1950] I.C.J. 128, 131-138. Article 80 provides:

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

The Article was drafted specifically to govern the future of the Palestine Mandate. See R. Russell, A History of the United Nations Charter 827-830 (1958).

trust under Article 80.³¹ In Palestine, Israel and Jordan already exist as states, and only the Gaza Strip and the West Bank remain as unallocated parts of the Mandate. The reasoning of the *Namibia* decisions requires that the future of these two territories be arranged by peaceful international agreement in ways which fulfill the policies of the Mandate.

Jewish rights of "close settlement" in the West Bank are derived from the Mandate. Therefore they exist; it is impossible seriously to contend, as the United States government does, that Israeli settlements in the West Bank are illegal.³²

It is true that since the Six Day War in 1967 the United States government has taken the nominal position that Israel held the Sinai, the Golan Heights, the West Bank, and the Gaza Strip only as the military occupant under international law. The State Department has maintained that under Article 49 of the Fourth Geneva Convention,³³ a state administering the territory of another

31. It has been argued that the decisions of the I.C.J. do not declare the "true" state of international law because the Court represents the "bourgeois" or "colonialist" law of the nineteenth and early twentieth centuries. In its own terms, this criticism could hardly be applied to the *Namibia* cases. The continued existence of the principles of the original Mandate was repeatedly confirmed by the General Assembly throughout the decades-long squabble over the South West Africa Mandate, particularly in G.A. Res. 2145, 21 U.N. GAOR, Supp. (No. 16) 2, U.N. Doc. A/6316 (1966). It is ironic to note that many of the nations which seek to challenge the original validity and continued vitality of the Mandate for Palestine were among the first to welcome I.C.J. decisions and General Assembly and Security Council resolutions confirming the continued existence of the South West Africa Mandate and its principles.

32. See e.g., Statements of U.S. Representative William Scranton to the United Nations Security Council, 74 Dep't State Bull. 526, 527 (1976), and the opinion of Legal Adviser Herbert J. Hansell on the legality of Israeli settlements in the occupied territories, 17 Int. Legal Mat. 777 (1978).

33. Article 49, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. See also, Article 43 of the Convention Respecting the Laws and Customs of War on Land (Hague IV), 36 Stat. 2277, T.S. No. 539.

state as military occupant cannot in the absence of military necessity or governmental need displace the inhabitants of the territory and establish its own citizens in their place. The Department's position is in error; the provision was drafted to deal with "individual or mass forcible transfers of population," like those in Czechoslovakia, Poland, and Hungary before and after the Second World War. Israeli administration of the areas has involved no forced transfers of population or deportations.

The Israelis responded to the State Department in an argument of great cogency which the State Department has never answered.³⁴ The Israeli view is that while the 1907 Hague Convention and the 1949 Geneva Convention apply to the Israeli occupation of the Golan Heights and the Sinai, which are Syrian or Egyptian territory in the contemplation of international law, they do not apply to the Israeli occupation of the West Bank and the Gaza Strip, which have not been recognized as parts of any state, but are still unallocated territories of the Palestine Mandate. In terms, the 1949 Geneva Convention simply does not deal with the situation in Palestine, in which neither Jordan in the West Bank nor Egypt in the Gaza Strip could claim after 1967 that its prior administration was that of the legitimate sovereign whose rights were temporarily displaced by the fortunes of war. In the telling phrase of Professor Yehuda Blum, the reversioner was missing.³⁵ Israel's claim to the area is at least as good as Jordan's.³⁶

Since the Conventions deal only with military occupation by one state of territory belonging to another, Israel said, it is not obliged to apply the Conventions in the West Bank and the Gaza Strip. But it vowed to do

34. See M. Shamgar, 'The Observance of International Law in the Administered Territories', 1 Israel Y.B. Human Rights 151 (1971) (author was Attorney General of Israel when article was written); Y. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 Israel L. Rev. 279 (1968).

35. Blum, *supra* note 34 at 294. For the Jordanian view, see letter to the editor of Jordanian U.N. Representative Hazem Nuseibeh, New York Times, June 1, 1979, at A24.

36. See S. Schwebel, *What Weight to Conquest?*, 64 Am. J. Int. L. 344 (1970), (author argues that Israel's title to the territories occupied after the 1967 war is superior to that of Jordan because Israel gained possession of the territory in a war of self-defense).

so in general terms as a matter of its own policy. And it noted that Jordan was not subjected to the restrictions of the Geneva Convention when it administered the West Bank as military occupant between 1948 and 1967. This approach to the problem has just been confirmed and upheld by the Israeli Supreme Court, in a case holding a settlement illegal under Israeli law.³⁷

The disagreement between the United States and Israel on this subject has slumbered for years. No effort was made to push it to a definite conclusion until the Carter Administration, with its enthusiasm for the so-called "Palestinian" cause, took office in 1977. Before 1977, it was assumed that the controversy would be resolved when Jordan and Israel made peace.

The American argument, weak at best in terms of the language and history of the 1949 Geneva Convention, has been further eroded by the development of international law since 1967 in connection with the future of Namibia, which the State Department's statements on the subject do not discuss, and by the Camp David agreements.

The State Department should long since have reconsidered its 1967 position about Israeli settlements in the West Bank in the light of the principles confirmed by the *Namibia* decisions. It is obvious that Israel's position in the West Bank and the Gaza Strip is much more than that of a military occupant under international law. According to the reasoning of the *Namibia* decisions, Israel's right under the Palestine Mandate--including its right of close settlement in the West Bank--survived the end of the Mandate and will continue until Jordan and Israel settle what is essentially a territorial dispute between them, make peace, and divide the land in accordance with the provisions of Security Council Resolution 242, which is based on the Mandate.

The case for treating the West Bank and the Gaza Strip as "Arab" territory is not helped by contending that the existing population of the area is largely Arab. That was true for all of Palestine, except for Jerusalem, when the Mandate was established. Jewish settlement in a land then populated mainly by Arabs is what the Mandate specifically authorizes.

37. HCJ 390/79 (S. Ct. Israel 1979).

The government of the United States often complains that Israeli settlements in the West Bank are a political obstacle to peace even if they are not "illegal," because they deter Jordan from making peace. But Jordan would not make peace between 1949 and 1967 when it occupied the West Bank and administered it as national territory. At that time, there were no Israeli settlements in the West Bank. King Hussein is probably not a supporter of the classic view that the Balfour Declaration and its consequences were an abomination, and that Israel must be destroyed as the Crusader Kingdom was destroyed. But he joined in the Wars of 1967 and 1973 against Israel. And Jordan still refuses to make peace, despite the binding "decision" of Security Council Resolution 338. Perhaps Israeli settlement in the West Bank would stimulate Jordan to make peace, by making it clear that its continued refusal to make peace is not costless, and that it cannot expect conditions to remain unchanged indefinitely.

Whether Israeli settlement in the West Bank is a wise political tactic at any given time is not, however, the subject of this paper. To explore that issue under the circumstances of any particular period in the history of the Mandate would be an exercise in speculation. For present purposes, it suffices simply to conclude that Israel's legal position with regard to its right of settlement in the West Bank is impregnable.

III

The next step in the analysis goes beyond the Mandate to the long cycle of Security Council decisions on how to achieve peace between Israel and its neighbors, and to the Camp David Agreements which seek to implement those Security Council Resolutions.

In 1947, finding that the twin purposes of the Mandate were irreconcilable, Great Britain announced that it would give up the Mandate in 1948, and turn the problem over to the United Nations as successor to the League of Nations. The Security Council had received a Report from the General Assembly, recommending that it adopt a plan for partitioning what was left of the Mandate (after the establishment of Transjordan) into an Arab state and a Jewish state, with a special regime for Jerusalem, and arrangements for cooperation among

the peoples and governments of the territory.³⁸ The British and many others concerned with the problem expected Transjordan to absorb the territories allocated to the Arab state under the 1947 Partition plan.³⁹

The Security Council did not accept the General Assembly's recommendations. It did nothing.⁴⁰ Israel declared its independence as the Jewish state contemplated by the Partition plan. But the Arab states in the area made war on Israel, on the grounds that (1) the Mandate was and always had been illegal; (2) the General Assembly's Partition plan was a nullity; (3) upon the withdrawal of Great Britain from Palestine the inchoate sovereignty of the Palestinian people in the territory had to be acknowledged; and (4) the establishment of Israel was "an armed attack" on the territorial integrity and political independence of the emerging state of Palestine, which the people of Palestine and their neighbors had a right to resist in the name of self-defense, according to Article 51 of the Charter.⁴¹

The first Arab-Israeli war of 1948-49 came to an end under the twin pressures of Israeli military success and international political urging.⁴² The Security

38. G.A. Res. U.N. Doc. A/519, at 131-32 (1948).

39. See Gerson, *supra* note 17, at 44-46.

40. Explanations of the reasons for the Security Council's failure to act can be found in C. Sykes, *Cross Roads to Israel* 408-413 (1965); H. Feis, *The Birth of Israel: The Tangled Diplomatic Bed* 34-48 (1969).

41. The Arab states' view was set out in a cablegram from the League of Arab States to the Secretary General of the U.N. on May 15, 1948, *reprinted in* 3 Moore, *supra* note 21, at 352-357. The League's argument, repeatedly rejected by decisions and other resolutions of the Security Council, is the heart of the Arab case against the legitimacy of Israel. It remains the prevailing and official Arab view. See, e.g., F. Yahia, *The Palestine People and International Law in Crescent and Star* (Y. Alexander & N. Kittrie eds. (1973), pp. 6-27; speech of Yasir Arafat before the General Assembly of the United Nations, *reported in* New York Times, Nov. 14, 1974, at 22, col. 1. See also the Palestinian National Charter, especially Articles 19 and 29, *reprinted in* Y. Alexander & N. Kittrie, *supra*, at 447-451; *The Khartoum Declaration*, *id.* at 427-429; *Palestinian Leaders Discuss the New Challenges for the Resistance*, in *The Palestinians: People, History, Politics* 166-170 (Curtis et al., eds. 1975); note 53, *infra*.

42. See N. Safran, *From War to War* (1969).

Council issued several binding "decisions," ordering the parties to sign armistice agreements, and then to make peace.⁴³ The Armistice Agreements were duly signed.⁴⁴ But peace did not follow. The conflict over Israel's right to exist was caught up in the Cold War, which was rapidly spreading to areas near the boundaries of the Soviet Union in Asia and Europe. The Soviet Union refused to join the Western powers in efforts to press for an Arab-Israel settlement. Formally, it rejected the theory that the existence of Israel was an aggression against Palestinian rights.⁴⁵ But it backed Arab programs for destroying Israel based on that theory, and it acquiesced in Security Council Resolutions calling upon or commanding the Arab states to make peace with Israel only when Israeli military victories threatened the complete destruction of the Arab armies.

Thus four major wars against Israel took place after 1949--those of 1956, 1967, 1973, and the war of attrition of 1969-70. In each of these episodes, and throughout the continuing cycle of guerrilla attacks against Israel, Soviet involvement on the Arab side was heavy, and often decisive. Each of the wars ended in a political settlement of sorts. The 1956 war was followed by an informal and largely invisible agreement between Israel and Egypt, worked out through the good offices of the United States, Great Britain, and the Secretary-General of the United Nations. The agreement was embodied in a series of statements, resolutions, and silences which took place in prearranged sequence

43. *E.g.*, S.C. Res. 54, 3 U.N. SCOR, Resolutions and Decisions 22, U.N. Doc. S/INF/2/Rev.1 (III) (1948); S.C. Res. 62, 3 U.N. SCOR, Resolutions and Decisions 29, U.N. Doc. S/INF/2/Rev.1 (III) (1948); S.C. Res. 73, 4 U.N. SCOR, Resolutions and Decisions 8, U.N. Doc. S/INF/3/Rev.1 (1949).

44. 42 U.N.T.S. 251-270 (Israel-Egypt), 287-298 (Israel-Lebanon), 303-320 (Israel-Jordan) and 327-340 (Israel-Syria) (1949), reprinted in 3 J. Moore, *supra* note 21, at 380-414.

45. See Yahia, *supra* note 41 at 16, 18-20; and I. Spector, *The Soviet Union and the Palestine Conflict*, in *The Transformation of Palestine* 439 (I. Abu-Lughod, ed. 1971).

in New York, Washington, London, and Cairo.⁴⁶ Through this accord, the Israelis agreed to withdraw from the Sinai, and Egypt promised to open the Strait of Tiran and the Suez Canal to Israeli shipping; to prevent guerrillas from operating against Israel from its territory; and in due course, to make peace.

The unhappy fate of the 1957 peace agreement was a decisive factor shaping Security Council Resolution 242, which followed the Six Day War in 1967 after five months of strenuous diplomatic effort and military testing. Resolution 242 returned to the principles of Resolution 62, adopted in 1948. It called for peace, and for an end to all claims on the part of the Arabs that a state of belligerence existed between Israel and its neighbors. In view of the refusal of the Arabs to carry out their earlier commitments to make peace with Israel, Resolution 242 was based on the principle that Israel had no obligation to withdraw from any territories occupied in the course of the war until the Arab states concerned actually made peace. Israeli occupation of the territories it took in 1967, that is, was "the gage of peace," in the phrase used by a French scholar.⁴⁷

Resolution 242 also provided that when peace was made, the Israelis should withdraw to "secure and recognized" boundaries, which need not be the same as the Armistice Demarcation Lines of 1949, as the Armistice Agreements themselves had contemplated. The "secure and recognized" boundaries were to be reached by agreement. In negotiating those agreements, the parties could take into account considerations of security; guarantees of maritime rights through all the international waterways of the region; factors of equity in

46. The fullest treatment of this subject thus far available is C.N. Rostow, *Diplomatic Patchwork: The United States and the Settlement at Suez, 1956-1957* (1972) (unpublished paper in Yale University Library). See also E. Rostow, *Law, Power and the Pursuit of Peace* 78 (1968); D. Ben-Gurion, *Israel: A Personal History* 522-536 (1971); T. Draper, *Israel and World Politics: Roots of the Third Arab-Israeli War* 19-22 (1968).

47. *L'Occupation, Gage Pour L'Obtention de la Paix*, Ch. 7 in P. Martin, *Le Conflit Israelo-Arabe* 231-251 (1973).

rectifying the armistice lines (which after all reflected no more than the position of the armies when the fighting stopped in 1949); and the respective legal claims of the parties to the territory in question.

Between 1967 and 1973, all efforts to carry out the terms of Resolution 242 failed. The Arab states stood on their Khartoum Declaration of 1967--"no peace, no recognition, no negotiations."⁴⁸ What the Arab states wanted was the pattern of 1957, *i.e.*, Israeli withdrawal at least to the 1967 boundaries without peace. This, of course, was exactly what Resolution 242 prohibited.

The diplomatic background of the 1973 war against Israel, launched by the Arab states with full Soviet backing and considerable Soviet participation, may never be fully known. But enough has emerged, largely from Egyptian sources, to make the outlines of the story clear. In April 1972, a month before President Nixon's dramatic visit to Moscow, the Soviet Union told President Sadat he could plan on a war soon, and the necessary preparations began at once.⁴⁹ A month later, the Soviet leadership assured President Nixon that it would cooperate in every way through the United Nations representative, Ambassador Jarring, to achieve the agreements of peace called for by Resolution 242.⁵⁰

The political outcome of the 1973 war was embodied in Security Council Resolution 338.⁵¹ The Soviet Union

48. The text of the declaration can be found in Alexander & Kittrie, *supra* note 41, at 427-429.

49. See text of interview with President Sadat in Lebanese newspaper *Al-Hawadith*, Foreign Broadcast Information Service, March 21, 1975, at D8-D9.

50. See New York Times, May 30, 1972 at 1; 66 Dep't State Bull. 857 (1972).

51. *The Security Council*,

1. *Calls upon* all parties to the present fighting to cease all firing and terminate all military activity immediately, no later than 12 hours after the moment of the adoption of this decision, in the positions they now occupy;

2. *Calls upon* the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts;

3. *Decides* that, immediately and concurrently with the ceasefire, negotiations shall start between the parties

had rejected American cease fire proposals for the first two weeks of the war. But when it was clear that the Syrian and Egyptian armies were beaten, and considerable Egyptian forces in the Sinai cut off, the Soviet Union pressed for a quick cease fire. The United States insisted on the critical third paragraph of the Resolution, which commands the states involved in the dispute "immediately and concurrently with the cease fire" to negotiate the establishment of a just and durable peace in accordance with Security Council Resolution 242 "in all its parts."⁵² This provision is the strongest and most detailed of the long series of Security Council Resolutions calling upon or ordering the states of the area to make peace with Israel. Legally, it is a definitive rejection of the Arab thesis that the existence of Israel is an "armed attack" on the sovereignty of Palestine, a thesis which remains the fundamental position of the P.L.O.⁵³

The Camp David Agreements between Egypt and Israel consist of two related documents--one concerning the establishment of peace between Israel and Egypt, the other requiring negotiations to establish "autonomy" in the West Bank and the Gaza Strip.⁵⁴ The "autonomy" negotiations should involve Egypt, Israel, the United States and, if possible, Jordan and representatives of the people living in the West Bank and the Gaza Strip. Both sets of negotiations are to be based on Security Council Resolutions 242 and 338. The Egyptian-Israeli peace negotiations have been successfully concluded; peace between the two nations has been established and is reflected in a series of moves which are normalizing

51. (Continued)

concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.

S.C. Res. 338, 28 U.N. SCOR, Resolutions and Decisions 10, U.N. Doc. S/INF/29 (1974).

52. See comments of Secretary of State Kissinger, 70 Dep't State Bull. 21, 23 (1974). See generally, Rostow, *supra* 14; Goldberg, *supra* note 14.

53. See note 41 *supra*. Confirmation that this remains the position of the P.L.O. can be found in interviews with Yasir Arafat, published in *Le Figaro* (Paris), March 13, 1980, p.1 and *France-Soir* (Paris), March 12, 1980, p.1.

54. The titles are *A Framework for Peace in the Middle East*, 17 *Int. Legal Mat.* 1466 (1978), and *Framework For the Conclusion of a Peace Treaty Between Egypt and Israel*, *id.* at 1470.

their relations. As this paper is being prepared (in March, 1980), the negotiations for autonomy in the West Bank and the Gaza Strip have not been concluded.

IV

What is the moral of this melancholy tale?

Legally, politically, and strategically, the obvious solution for the Palestinian problem is peace between Israel and Jordan in accordance with Resolutions 242 and 338. Such a settlement could take many forms. But peaceful settlement is the only way to end the problem of Palestine in ways which satisfy the terms of the Mandate and of the Security Council Resolutions which have sought to carry out its principles.

Thus far, the most promising idea for peace between Jordan and Israel is the proposal put forward by the Israeli Foreign Minister at Strasbourg more than a decade ago.⁵⁵ That proposal would establish definitive boundaries between Jordan and Israel, dividing the West Bank and perhaps making the Gaza Strip part of Jordan; unite the two countries in a common market (or confederation) open also to other states in the area; give Jordan a free port on the Mediterranean, probably at Haifa; make special arrangements for Jerusalem which would take fully into account all the religious interests in that city; and establish appropriate security dispositions.

Jordan rejected the Strasbourg plan when it was announced. It has continued to reject all proposals for peace based on Resolution 242.

So long as Jordan refuses to carry out its obligations under Resolution 338, there is no way to fulfill the policies of the Security Council. Israeli annexation of the West Bank and the Gaza Strip would not be recognized by the international community for the same reasons which led to the rejection of Jordan's attempt to annex the West Bank in 1951. The territories are parts of the Mandate. According to the principles of the *Namibia* decisions, their disposition should be arranged in ways which fulfill the terms of the Mandate. From this perspective, the Camp David autonomy plan for the West Bank

55. See New York Times, Sept. 28, 1967, p.1.

and the Gaza Strip is neither a settlement, nor even a promising step towards a settlement. The inherent ambiguity of the concept of autonomy, unless it is strictly bracketed with the terms of Resolution 242, would create an insoluble tension between Israeli, Arab, and Western notions of how to proceed. That tension, punctuated by riots and demonstrations on the West Bank and elsewhere, could hardly improve the chances of stability and peace.

There is no foundation in international law for the idea of a second Arab Palestinian state in the West Bank and the Gaza Strip. And it would be political and military folly for the West to force Israel to acquiesce in such a scheme. Establishing a new Arab state there would injure Western interests, and advance those of the Soviet Union, by strengthening the Soviet position in the region, and by increasing Arab dependence on Soviet protection. It would weaken Israel, which, since the fall of Iran, is the most important Western ally in the area.

Above all, such a policy would abandon the moral and political obligations towards Israel which the victorious Allies assumed in 1919, and reiterated through the United Nations Charter in 1945.

Israel's legitimacy as a state rests on much more than the usual criteria of international law--*de facto* statehood; membership in the United Nations; recognition; the success of its armed forces; the weight of history; and so on. In 1922, the organized international community of the day, the League of Nations, with the special concurrence of the United States, which was not a member, established the Palestine Mandate. Through that Mandate, it invited Jews to come to live in Palestine as their national home. In reliance on that promise, the Jewish community in Palestine developed, and, with the approval of the Security Council and the General Assembly of the United Nations (the successor to the League), became the state of Israel. The solemn obligations of the international community to Israel implicit in these events survive not only as a special moral and historic element in Israel's status within the family of nations, but as a trust still applicable, with other norms and interests, to the task of fashioning a just and durable future for the West Bank and the Gaza Strip.

For the West to betray those commitments would be to take another long step towards dissolving the world community organized as the United Nations into a condition of universal war.

V

The functions of law in the life of international society are no different from its functions within national societies. In one realm as in the other, law offers society a way--the principal way--to fulfill its aspirations for order and for justice. Law is both a process for settling disputes peacefully and a model for behavior--a pattern of behavior deemed right. Despite the absence of a "sovereign" to "command," international law is quite as legitimate as municipal law, and for the same reasons. It develops in much the same way. And it is obeyed about as much. If society--domestic or international--no longer accepts the declared behavioral standards of law as model and norm--if, that is, it does not insist on returning to them when deviations occur--there are two possible explanations. The law may be changing because society is developing and accepting new norms, new patterns of behavior deemed right. In such a case, law as order survives unchanged, fortified as it adapts its notions of justice to change in the moral code of society. On the other hand, the weakening influence of older legal norms on behavior may measure an altogether different phenomenon, that is, the decline of law as the generally accepted procedure for resolving social conflicts. In such an event, society is repudiating law as order, and moving *pari passu* into a state of anarchy. States of anarchy have almost invariably resulted in states of war, and then of order restored--but often, alas, of order restored as tyranny.

The long, bitter, and thus far unresolved conflict over the place of Israel in the state system raises this stark issue. For more than thirty years the Security Council, speaking for the organized international community, has insisted that Israel is a legitimate state, born of the Mandate, and that members of the United Nations are therefore legally and morally bound to make peace with it in accordance with the terms of the Mandate and of the Security Resolutions which seek to apply them. Throughout this period, a shifting but important group of states, strongly backed by the

Soviet Union, has asserted that the Mandate and all that flowed from it was illegal, and that the existence of Israel is in itself an aggression against the sovereignty of the Palestinian people, defined as the descendants of those who lived in the territory of the Mandate in 1922.⁵⁶

The Security Council demands peace between Israel and Jordan--a peace that would settle the territorial dispute between them about the West Bank and the Gaza Strip. Jordan, following the Rabat decision, stands aside, and urges that the P.L.O. be accepted as the sole legitimate representative of the Palestinian people. Resisting all Western political pressure, the P.L.O. refuses to modify its firm commitment to the principle of a single secular state for the entire territory of the Palestine Mandate.

For these reasons, the vehement effort to force Israel to accept a P.L.O. state including the West Bank, Jerusalem, and the Gaza Strip rests on a misapprehension. The proponents of "Palestinian self-determination" in this sense believe that such a step would eliminate the only point of dissension between the majority of the Arabs and the West: Palestine. They cannot bring themselves to believe that the object of the campaign for a third Palestinian state is not a peaceful solution of the Palestine problem, but the destruction of Israel. Thus they fail to address the reality before them, like those who supported Lord Runciman's proposals for Czechoslovakia and the Hoare-Laval plan for Ethiopia a generation ago.

The legal issues are beyond significant dispute. The remaining question is whether a decisive coalition of member nations will insist that Jordan fulfill the law, or whether in this sensitive and volatile area the law will be abandoned, both as justice and as order. Only Jordan and Israel can solve the Palestinian problem; they are the Palestinian states, and they speak for the Palestinian people. Until Jordan is ready to make peace, it is difficult to imagine a just and lasting solution for the problem. For Jordan and for many other small and vulnerable states of the region, the real issues now are not legal but political and military. Those states are concerned above all with

⁵⁶. See note 41, *supra*, and letter to the editor by Jordanian U.N. Representative Hazem Naseibeh, New York Times, June 1, 1979, at A24.

one overriding question--who is going to win? Will the United States and its Allies reestablish the system of world public order contemplated by the Charter of the United Nations,⁵⁷ or will the Soviet Union succeed in its quest for dominance?

To recall a famous sentence, that primordial question haunts the world. The answer will determine the relevance of international law to international politics, and much besides, for a long time to come.

57. The author has addressed the problem of reestablishing the Charter system of world public order as the central issue of this branch of international law and politics in a series of essays: Law, Power, and the Pursuit of Peace, ch. 5 (1968); Peace in the Balance, ch. 9 (1972); The Ideal in Law, ch. 9 (1978); Foreword, *What is our Defense Program For? American Foreign and Defense Policy After Vietnam*, in F. Hoerber & W. Schneider, Jr., *Arms, Men and Military Budgets* (1977).

In these papers, I have been much influenced by the seminal work of my colleague and friend Myres S. McDougal. See M. McDougal & F. Feliciano, *Law and Minimum World Public Order* (1961); *Studies in World Public Order* (1960).

The growing anarchy of the last two decades has stimulated fresh interest in the problem of order. See H. Bull, *The Anarchical Society* (1977); S. Hoffmann, *Primacy or World Order* (1978); Julius Stone, *Conflict Through Consensus* (1977).